

\$1,500.00 for transport expenses. Funeral expenses and the cost of extracting the letters of administration were agreed at \$1,250.00 and \$350.00 respectively. I awarded interest at 4 per cent on special damages from the date of the accident. There was a claim also for future earnings representing the "lost years" but I made no award on this item as I found insufficient evidence to do so.

Order accordingly.

Solicitors: *R.K. Nathan & Co.; Lovelace & Hastings.*

A BRUNEI REPORT

PUBLIC PROSECUTOR v. JEE SCHOW KUNG

[Case Stated (Roberts C.J.) February 2, 1980]
[Bandar Seri Begawan – B.S.B./C.C./4044 of 1979]

B *Criminal Law and Procedure – Charge – Question reserved for court – Whether magistrate was right in ordering retrial on amended charge*

C The accused in this case was charged "that you at about 3.15 pm on the 19th day of May, 1979, at Haji Daud's Flat, Jalan Gadong, Bandar Seri Begawan, Brunei, in the State of Brunei, consumed a controlled drug, to wit diamorphine, and that you thereby committed an offence punishable under section 6(b) of the Misuse of Drugs Enactment, 1978".

D The accused pleaded guilty but, after conviction, put forward in mitigation facts which, if believed, would have amounted to a defence to the charge. The accused's appeal to the High Court against his conviction was quashed. The case was sent back to the Magistrate's Court for retrial. On October 30, 1979, the accused was brought before the Magistrate's Court. He was charged "that you, at about 1502 hours on May 19, 1979, at Haji Daud's flat, Jln. Gadong, Bandar Seri Begawan, in the State of Brunei, not being a person authorized thereunder, had consumed a controlled drug, to wit morphine and codeine, and that you thereby committed an offence under section 6(b) of the Misuse of Drugs Enactment, punishable under section 29 of the aforesaid Enactment".

F Counsel for the accused objected to the form of charge on the grounds that it was different in material particulars from the original charge and that the defendant should be tried only on the original charge, in respect of which the High Court had ordered a retrial.

G The magistrate ordered that the trial should continue on the amended charge. He reserved a question of law for the High Court: "Whether the said determination was correct in point of law and what should be done in the premise".

Held: (1) the terms of section 285(c) of the Brunei Criminal Code make it clear that a new trial may be ordered by the High Court on the same or an amended charge. Therefore the strict requirement of *Nazimuddin case* does not apply in Brunei;

H (2) since it is open to the Judge to order a retrial on the amended charge, he may direct what amendment shall be made to the original charge;

(3) once a charge is before the court, amendment of it requires the leave of the court. As the Judge has ordered a retrial of the original charge, the permission of the magistrate must be obtained to amend it;

I (4) in the present case the prosecution presented an amended charge instead of seeking leave to amend the original charge. Had they sought leave, there was no doubt that the magistrate would have granted it, since he was prepared to proceed with the trial on the amended charge. A new trial on the amended charge laid before the magistrate on October 30, 1979 was therefore ordered to be held.

Cases referred to:—

- (1) *Nawi Bin Buyong v. Public Prosecutor* [1936] M.L.J. 71
- (2) *Lee Teck Hock v. Public Prosecutor* [1973] 2 M.L.J. 130
- (3) *Lee Weng Sang v. Public Prosecutor* [1977] 1 M.L.J. 166
- (4) *Nazimuddin v. King Emperor* I.L.R. 40 Cal. 163

Roberts C.J.: This is a Reservation of a question of law under section 294 of the Criminal Procedure Code by Robert Augustin Esq., Acting Chief Magistrate.

Jee Schow Kung ("the defendant") was charged in the Magistrate's Court in the following terms:—

"That you at about 3.15 p.m. on the 19th day of May, 1979, at Haji Daud's Flat Jalan Gadong, Bandar Seri Begawan, Brunei, in the State of Brunei, consumed a controlled drug, to wit diamorphine, and that you thereby committed an offence punishable under section 6(b) of the Misuse of Drugs Enactment, 1978".

The evidence was that an examination of the defendant's urine showed the presence of diamorphine, thus giving rise to the presumption that he had consumed it.

The defendant pleaded guilty but, after conviction, put forward in mitigation facts which, if believed, would have amounted to a defence to the charge.

The defendant appealed to the High Court against his conviction. The High Court quashed the conviction, on the ground that the magistrate should have afforded the defendant an opportunity to change his plea, and made an order as follows:—

"The case will be sent back to the Magistrate's Court for retrial".

The defendant was brought before the Magistrate's Court again on October 30, 1979. The charge read:—

"That you, at about 1502 hours on May 19, 1979, at Haji Daud's flat, Jln. Gadong, Bandar Seri Begawan, in the State of Brunei, not being a person authorized thereunder, had consumed a controlled drug, to wit morphine and codeine, and that you thereby committed an offence under section 6(b) of the Misuse of Drugs Enactment, punishable under section 29 of the aforesaid Enactment".

At the outset of the trial on December 11th, 1979, counsel for the defendant objected to the form of the charge, on the grounds that it was different in material particulars from the original charge and that the defendant should be tried only on the original charge, in respect of which the High Court had ordered a retrial.

A The magistrate ordered that the trial should continue on the amended charge and set it down for hearing on March 1, 1980.

He then reserved a question of law for the opinion of the High Court in the following terms:—

B "Whether the said determination was correct in point of law and what should be done in the premise".

The Judge, when ordering a retrial, was exercising the powers conferred by section 285(c) of the Criminal Procedure Code, which reads:—

C "In an appeal from a conviction the court may —

(c) direct that further enquiry be made or order a new trial on that same or an amended charge;" ...

It is to be noted that the Judge merely ordered that the case be sent back to the Magistrate's Court for "retrial". He did not specify whether this should be on the same or an amended charge.

Reference was made in argument before the Magistrate to three decisions.

E In *Nawi Bin Buyong v. Public Prosecutor*⁽¹⁾, the Appellate Court of the Federated Malay States found that there had been an inadequate direction by the trial judge to assessors. At p. 74 Cussen J. said:—

F "The Court of Appeal has jurisdiction to order a retrial and such order, unless especially limited, is an order to retry on the original charge. The first trial is set aside and cancelled and the proceedings commence *de novo* with the original charges, unless the prosecutor decides on the retrial to proceed on a reduced charge".

G In *Lee Teck Hock v. Public Prosecutor*,⁽²⁾ the effect of section 267(c) in the Sarawak Criminal Procedure Code, which is in identical terms to section 285(c) of the Brunei Criminal Procedure Code, was considered.

H The Judge had ordered a "retrial", after quashing a conviction for driving without due care and attention. When the matter came before the magistrate, the defendant was charged both with that offence and with an additional offence of driving without reasonable consideration.

I B.T.H. Lee J. held that the magistrate should not have permitted the additional charge to be added, before any evidence was produced before him, since the Judge had "merely ordered a retrial".

However, as I read B.T.H. Lee J.'s judgment at p. 131, he concedes that a magistrate would have

been entitled, at the close of the prosecution's case, to amend the charge or to add other charges.

In *Lee Weng Sang v. Public Prosecutor*⁽³⁾ Hashim Yeop A. Sani J. held that it was open to the Public Prosecutor, where a Judge had ordered a "new trial before another magistrate" to substitute for the original charge another charge, which was of a more serious nature than the original one.

The Judge refers, as was done in the other two cases cited above, to *Nazimuddin v. King Empe- ror*⁽⁴⁾, in which it was said that "when a conviction is set aside and a retrial is ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed".

Hashim Yeop A. Sani J., after referring to the wide power conferred on the Public Prosecutor by section 376 of the C.P.C. of Malaysia, came to the following conclusion at p. 167:—

"An order of retrial would result in the trial to commence *de novo* and it is my opinion that even if the Appellate judge had thought fit to frame the charge or charges appropriate in his view for retrial, that would not prevent the Public Prosecutor from exercising his own power under the C.P.C. to amend, alter, reduce or enhance the charges or even to offer no evidence in the proceedings. It is on this point that I have, with respect, to disagree with the conclusion in *Lee Teck Hock's* case".

Perhaps I may summarize the effect of these four authorities as follows:—

- (a) *Nazimuddin*. : The accused must be retried on the charges originally framed.
- (b) *Nawi Bin Bujong*: The Accused shall be tried on the original charge unless the court includes limitations in its order for retrial or the prosecution decides to proceed on a reduced charge.
- (c) *Lee Teck Hock*: The trial should proceed on the original charge, but that the charge could be amended, or others charges added, at the close of the prosecution case.
- (d) *Lee Weng Sang*: Another charge may be substituted for the charge in respect of which the retrial was ordered, even if the substituted charge is for a more serious offence.

Thus there seems to be a gradual move away, in these cases, from the strict limitations imposed by *Nazimuddin* to the acceptance by the court, in *Lee Weng Sang*, that the prosecution's direction as to which charge to bring is not so restricted and that any charge may be substituted for the original one, if it arises from the same facts.

The terms of section 285(c) of the Brunei C.P.C. make it clear that a new trial may be ordered by the High Court on the same or an amended charge. Therefore the strict requirement of *Nazimuddin* does not apply in Brunei.

Since it is open to the Judge to order a retrial on an amended charge, he may direct what amendment shall be made to the original charge.

If the Judge does not do so, but merely directs a "new trial" (or a "retrial" as in this case) it must be presumed that he has ordered a new trial on the same charge. In this event, the proper course for the prosecution is to bring the original charge before the magistrate and then seek his leave to amend it if they wish to do so.

The requirement that the prosecution should obtain leave to amend where a retrial is ordered on the original charge, should not be taken as a derogation from the general discretion of the prosecution to decide what charges shall be brought and in what form. However, once a charge is before the court, amendment of it requires the leave of the court. As the Judge has ordered a retrial of the original charge, the permission of the magistrate must be obtained to amend it.

Although the point does not arise, I think that I should express my view that the prosecution, if they wish to bring further charges, whether or not arising out of the same facts but properly triable with the charge which is to be retried, may add them without leave before the retrial begins, as they could do if the retrial was the initial trial.

For reasons which differ somewhat from those of the magistrate, I have come to the same conclusion, namely that it is proper for a retrial to be held on an amended charge.

The question remains as to the proper order to be made in this case. As I have found, the prosecution presented an amended charge instead of seeking leave to amend the original charge. Had they sought leave, I have no doubt that the magistrate would have granted it, since he was prepared to proceed with the trial on the amended charge.

It would thus be pointless, to require the prosecution to formally seek leave to amend, (though they should do so if similar circumstances arise again). I therefore direct that the new trial be held on the amended charge laid before the Magistrate on October 30, 1979, as further amended by the magistrate, on the application of the prosecution, by the deletion of the words "and codeine".

Order accordingly.